Supreme Court, U.S.
FILED
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(2)

No. 03-774

In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

BERNARD BUNCH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. After arresting the driver of a lawfully stopped vehicle and deciding to tow that vehicle, thus concluding the purpose of the stop, whether a police officer can then interrogate the passenger of that vehicle about matters unrelated to the purpose of the traffic stop merely because the officer was "curious."

2. Whether probable cause exists to arrest an individual where the officer approached the individual and engaged him in conversation without having any basis to suspect he was involved in the use or possession of narcotics and then during that conversation the officer observes a white packet in that person's mouth that the officer suspected contained "either heroin or cocaine."

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RESPONDENT'S BRIEF IN OPPOSITION TO THE STATE OF ILLINOIS' PETITION FOR A WRIT OF CERTIORARI

Respondent, Bernard Bunch, respectfully asks this Court to deny the State of Illinois' request for this Court to issue a writ of certiorari to the Supreme Court of Illinois to review that court's judgment and order entered on August 21, 2003.

OPINIONS BELOW

Petitioner's recitation of the opinions below is complete and correct.

JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's recitation of the applicable Constitutional provisions involved is complete and correct.

STATEMENT OF THE CASE

Respondent's motion to quash arrest and suppress evidence proceeded simultaneously with his trial. Officer Lukensmeyer testified that at 1:10 a.m. on February 1, 2000, he was working alone in a marked police vehicle in the area of Thirty-Fifth Street and Wentworth Avenue in Chicago. He observed a 1990 Pontiac, which was proceeding westbound on Thirty-Fifth Street, slow down and come to a brief stop. Lukensmeyer did not see the vehicle's brake lights activate. As the Pontiac continued on its way,

Lukensmeyer shined his MARS lights, take-down lights, and his bright headlights into the rear of the car. Lukensmeyer testified that he saw the driver lean forward twice toward the dashboard before the driver pulled the vehicle over and stopped. Respondent, a passenger in the front seat of the vehicle, was the only other person in the vehicle. Lukensmeyer approached the vehicle on the driver's side and commanded both the driver and the Respondent: "Don't move!" Lukensmeyer then asked the driver for his license. When the driver could not provide a license, Lukensmeyer asked him to step out of the vehicle and placed him under arrest. He handcuffed the driver and walked him to the rear of the car.

According to Lukensmeyer, he then walked around to the passenger side of the vehicle and asked Respondent to exit the car and step to the rear of the vehicle, where the driver was standing. Lukensmeyer testified that he asked Respondent out of the car so that he could "take charge" of the vehicle, i.e. because the driver was arrested Lukensmeyer was going to have the car transported to the station where it would be towed to an impound lot. At some point during the traffic stop, Lukensmeyer learned the driver was the owner of the vehicle, but he could not recall whether this occurred before or after he asked Respondent to exit the car.

Lukensmeyer testified that after Respondent exited the vehicle, he asked him, "What's your name? Where you [sic] coming from?" When questioned on cross-examination as to why he asked Respondent these questions, Lukensmeyer responded, "I'm a policeman [.] I want[ed] to know who he was and I was curious to find out exactly who he was. That's all." Respondent provided his name and additionally asked Lukensmeyer why the driver was being arrested. Lukensmeyer answered Respondent's question. During this conversation, in which the two men were about one foot apart, Lukensmeyer twice shined his

flashlight in Respondent's face. Lukensmeyer explained that when he is working nights, he shines his flashlight in everyone's face because there is a "strong possibility they may have something in their mouths." Lukensmeyer denied that he questioned Respondent merely to see if there was anything in his mouth.

Both times Lukensmeyer shined his flashlight in Respondent's face, he observed a small, clear plastic item, containing something white, in Respondent's mouth. Lukensmeyer testified: "I had my suspicions that it was either heroin or cocaine, one or the other." Lukensmeyer informed Respondent he was under arrest. He then ordered Respondent to spit the object out of his mouth, which he did. Lukensmeyer recovered one plastic bag containing a white powder, which later tested positive for the presence of heroin. Lukensmeyer handcuffed Respondent and called for assistance. During his search of the Pontiac, Lukensmeyer recovered two similar plastic bags, also containing what he believed to be heroin, from a space in the dashboard. At this point, according to Lukensmeyer, Respondent made an unsolicited statement that "all the heroin you found is mine."

According to Lukensmeyer, after he arrested the driver and Respondent, he then tested the vehicle and discovered the brake lights were, in fact, working properly. The parties stipulated to the chain of custody and that the white powder tested positive for the presence of heroin. In connection with his motion to quash arrest and suppress evidence, Respondent argued that the officer did not have legal justification to ask him to exit the vehicle, to step to the rear of the vehicle, or to interrogate him. The State maintained that moving Respondent to the rear of the vehicle was minimally intrusive and that no interrogation took place. Rather, Respondent engaged the officer in conversation.

The trial court denied Respondent's motion. In its oral ruling, the trial court indicated it found the officer's testimony credible. The trial court concluded there was nothing impermissible in asking Respondent his name and that moving Respondent to the rear of the car had no legal significance. The trial court further speculated the officer had numerous reasons to have a conversation with Respondent, including explaining to him the reason for the arrest and determining if Respondent could be an alternative driver. According to the trial court, shining the flashlight in Respondent's face merely allowed the officer to assess Respondent in poor lighting conditions. Finally, the trial court found that the officer had probable cause to arrest Respondent, based on his observation of the object in his mouth.

Following the trial court's denial of Respondent's motion, the bench trial continued with Respondent's testimony. Respondent offered a different version of events. Respondent testified that when the driver of the vehicle, his brother, asked Officer Lukensmeyer why he stopped them, the officer replied, "Because I saw two black men in the car." The officer made no mention of the Pontiac's brake lights and never examined them. According to Respondent, after arresting and handcuffing his brother, Officer Lukensmeyer then placed his brother in the police vehicle. He then approached Respondent and asked him to get out of the vehicle. Once outside the vehicle, Lukensmeyer told Respondent to turn around and then placed handcuffs on him, saying that it was for the officer's own safety. As Lukensmeyer spoke to him, the officer shined a flashlight in his face. Respondent testified that he did not have anything in his mouth, and that the officer never asked him to spit out anything. After placing Respondent in the police car, Lukensmeyer removed a black case from the trunk and returned to the police car and told Respondent and his brother that he

found drugs inside their car. Respondent denied having narcotics in his possession and denied telling Lukensmeyer that any drugs in the car belonged to him.

The trial court found Respondent guilty of possession of a controlled substance and subsequently sentenced him to a four-year term of imprisonment. The appellate court reversed, concluding the arrest of Respondent violated the fourth amendment to the United States Constitution (U.S. Const. amend. IV). 327 Ill.App.3d at 983-84. The appellate court stated, in relevant part:

> A police officer has to have some lawful authority to ask a defendant for identification * * *.
>
> In this case, the officer did more than ask for identification. He ordered the defendant out of the car and to the rear of it because he was 'curious.' The defendant submitted. We believe the defendant was detained at that point without lawful authority. Curiosity is not a good reason to detain. Everything that flowed directly from the unlawful detention must be suppressed. 327 Ill.App.3d at 983.

The appellate court also concluded there was an additional reason to grant the Respondent's motion. The court noted the officer made his arrest because, "I had my suspicions [the object in Respondent's mouth] was heroin or cocaine, one or the other." 764 N.E.2d 1189, 1193. The court noted, "Suspicions, no matter how reasonable, do not add up to probable cause to arrest." 764 N.E.2d at 1194; citing *Alabama v. White*, 496 U.S. 325 (1990). The Illinois Supreme Court affirmed. Citing to its earlier decision in *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), the Illinois Supreme Court analyzed the issue using the scope and duration analysis used by this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Florida v. Royer*,

460 U.S. 491 (1983) (plurality opinion). The Illinois Supreme Court framed the issue as follows:

> We must consider, as an initial matter, whether a question is related to the initial justification for the stop. If the question is reasonably related to the purpose of the stop, no fourth amendment violation occurs. If the question is not related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articuable suspicion that would justify the question. If the question is so justified, no fourth amendment violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articuable suspicion, we must consider whether, in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop. 796 N.E.2d at 1030.

The Court found the officer's questions ("What's your name?" and "Where you [sic] coming from?") were not related to the purpose of the stop, i.e. operating a vehicle without break lights, and the questions were not supported by a reasonable, articuable suspicion of criminal conduct. 796 N.E.2d at 1030-31.

The Court next found these questions impermissibly prolonged the Respondent's detention. 796 N.E.2d at 1032. The Court found the questioning impermissibly prolonged the detention because the driver had already been placed under arrest, and the officer had decided to have the car towed and the defendant was directed out of the vehicle for that purpose, yet the Respondent's detention continued. *Id.* Finally, the Court rejected the State's contention that, even if the purpose of the stop had been completed when the officer ordered the defendant out of the vehicle, the questioning was nonetheless permis-

sible because the ensuing conversation was purely consensual. 796 N.E.2d at 1031-32. Specifically, the Court held:

> The officer directed defendant to move to the rear of the vehicle, where the driver—who was already under arrest and handcuffed—was standing. Then, positioning himself just a foot from the defendant and shining his flashlight in defendant's face, the officer asked him," "What's your name? Where you [sic] coming from? Given these circumstances, we conclude that the officer's actions constituted a show of authority such that a reasonable person would conclude that he or she was not free to leave. 796 N.E.2d at 1032.

Even though the appellate court found there was no probable cause for the Respondent's arrest, the Illinois Supreme Court declined to address this issue. Subsequently, the State filed the instant Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS SUPREME COURT'S DECISION HOLDING AN OFFICER'S INTERROGATION OF A PASSENGER IN AN ALREADY SEIZED VEHICLE MUST NOT EXCEED THE PROPER SCOPE AND DURATION OF THE PURPOSE OF THE TRAFFIC STOP WAS A SOUND APPLICATION OF FOURTH AMENDMENT PRINCIPLES.

The Illinois Supreme Court's decision that officers must have some reasonable basis to exceed the proper scope and duration of the purpose of the traffic stop was a sound application of Fourth Amendment principles. Petitioner, The State of Illinois (hereinafter referred to as "the State" or "The State"), argues this Court should

grant its Petition because there is "general confusion within the law at the present time" with regard to the propriety of interrogating passengers in an already seized vehicle when conducting routine traffic stops. The State's Petition for Writ of Certiorari (hereinafter referred to as "St. Pet.") 10. The State argues this Court has issued conflicting opinions in this regard. St. Pet. 9-10. On the one hand, this Court has held that "mere police questioning does not constitute a seizure" and thus, in general, questions from a police officer toward an individual not suspected of any crime are permissible under the Fourth Amendment, unless such questioning constitutes an impermissible show of authority that would convey the impression that compliance with the questioning was required. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). However, this Court has also held that a police officer must have reasonable suspicion to detain a person on the street to ask him for identification. *Brown v. Texas*, 443 U.S. 47 (1979).

There is no conflict between these cases and thus the Illinois Supreme Court, in applying its earlier issued opinion in *People v. Gonzalez*, 204 Ill.2d 220 (Ill. 2003), correctly recognized the difference between the two situations. The Court held that, once a passenger is already seized by virtue of the law-enforcement-induced traffic stop, then the issue of the propriety of the questioning of the passenger must be resolved by applying the framework this Court has used in addressing the proper scope and duration of a stop based pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968); 796 N.E.2d at 1030. (*See Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion), where a plurality of this Court held an investigative detention must be "temporary and last no longer than is necessary to effectuate the purpose of the stop" and it "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a

short period of time.") In its Petition, the State completely ignores *Royer*, a case that is essential to the outcome of this case because it sets up the basic scope-duration *Terry* analysis that has been employed by virtually every court that has addressed this issue. Thus, in this case, the Illinois Supreme Court correctly held the police officer exceeded the proper scope and duration of the *Terry* stop where, after having already arresting the driver for not having a valid driver's license, and after deciding to have the car towed, he asked the passenger, "Who are you?"; "Where [are] you coming from?".

The State attempts to cast doubt on the conclusion of the Illinois Supreme Court by arguing this Court implied in *Maryland v. Wilson*, 519 U.S. 408 (1997) that police officers do not need any justification for asking a passenger questions and requesting his identification. St. Pet. 11. However, this Court's decision allowing a per se rule that officers may order passengers out of a car during a traffic stop, without any articuable reason for doing so, was based on compelling reasons of officer safety. Here, no such argument had ever been made, either in the lower court proceedings or in the State's Petition, that a per sue rule allowing officers to inquire into a passenger's identity and his recent whereabouts is necessary based on some compelling reason such as officer safety. The State has waived the right to argue a compelling reason would justify the extension of *Wilson*'s per se rule to allow officers to continue to interrogate passengers about whatever matter they choose, regardless of reasonable suspicion or some other legal justification.

Moreover, to the extent that the State argues in its Petition that Officer Lukensmeyer's questions to the Respondent ("What's your name?" and "Where [are] you coming from?") were designed to determine whether he would be able to drive away the vehicle, the officer admitted that by the time he asked Respondent these

questions, he had already decided to have the vehicle towed, and that he asked these questions merely because he was "curious to find out exactly who he was. That's all." 796 N.E.2d at 1027. Although both the trial court and the State on appeal speculated that these questions could have been designed to determine whether Respondent was willing or able to drive the vehicle from the scene, The Illinois Supreme Court accepted Lukensmeyer's admission that he asked these questions to satisfy his own idle curiosity. 796 N.E.2d at 1030-31. To the extent the State tries to manipulate the record to ignore this admission, Respondent objects.

The State correctly indicates there is a split among the federal Circuits with regard to whether an officer needs to articulate a justification for interrogating the passenger of an already stopped vehicle. Yet, as applied to the facts *sub judice*, this split is essentially irrelevant to the resolution of the case. The State argues that the Fifth, Seventh, Eighth, Ninth and Tenth Circuits have issued various holdings on what constitutes the proper scope and duration of a routine traffic stop. St. Pet. 11-13; citing *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (en banc), cert. denied, 537 U.S. 829 (2002); *United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994); *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001), cert. denied, 535 U.S. 948 (2002); and *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001) (en banc), cert. denied 535 U.S. 1019 (2002). The Fifth and Seventh Circuits have held the "scope" prong of the *Terry* stop only applies to seizures that unnecessarily prolong a detention, while the Eighth, Ninth and Tenth Circuits have held questioning must be justified in both scope and duration.

However, in this case the purpose of the stop concluded when the officer arrested the driver and decided to tow away the vehicle. Thus, even those Circuits that

have collapsed the scope and duration prong nevertheless agree there must be some reasonable basis for extending the *duration* of a traffic stop. *Shabazz*, 993 F.2d at 436; *Childs*, 277 F.3d at 952. In this case, the officer expanded the *scope and duration* of the stop merely because he was "curious" to find out the Respondent's identity. Thus, this case does not present this Court with the opportunity to address the actual split among the Circuits, i.e. whether the questioning *during* the course of the stop must be reasonably related to the purpose of that stop where such questioning does not unnecessarily prolong the duration of the stop. Accepting the State's Petition will not resolve this more contentious issue.

Similarly, save one, all of the state court cases cited in the State's Petition involved the questioning of passengers during the course of the stop, before its purpose had concluded. St. Pet. 14-15. *See State v. Griffith*, 613 N.W.2d 72 (Wisc. 2000) (questioning of the defendant, a passenger, occurred before the stop had been completed); *People v. Cartwright*, 85 Cal.Rptr.2d 788 (Cal. App. 1999) (same); *State v. O'Day*, 955 P.2d 860 (Wash. App. 1998) (same); *People v. Jackson*, 39 P.3d 1174 (Colo. 2002) (request for identification of the defendant, a passenger, occurred before the stop had been completed). The State only cites one case that involved a passenger, like Respondent, who was interrogated *after* the purpose of the stop had been completed. St. Pet. 15; *Graham v. Maryland*, 705 A.2d 82 (Md. App. 1998). Moreover, in *Graham* the court held the detention of the passenger after the trooper learned the driver did not have a valid driver's license was impermissible, concluding the trooper exceeded the scope and duration of that stop when he made the passenger wait for the arrival of a police canine unit. *Graham*, 705 A.2d at 93-94.

In sum, while the State is correct that there are a wide variety of appellate court opinions across the nation

with regard to the propriety of law-enforcement questioning directed toward passengers during routine traffic stops, this conflict will not be resolved by the case at bar because here the officer had already concluded the purpose of the traffic stop and the only reason he inquired into Respondent's name and recent whereabouts was because he was "curious."

Finally, contrary to the State's assertion, the Illinois Supreme Court did not place "special emphasis" on the fact that Officer Lukensmeyer shined a flashlight in Respondent's face when he was interrogating him about his identity and recent whereabouts. St. Pet. 15. Rather, the Illinois Supreme Court concluded the officer exceeded the proper scope and duration of the *Terry* stop, and thus the subsequent questioning of the defendant, which ultimately revealed the presence of narcotics secreted in his mouth, was the fruit of an illegal search and seizure. 796 N.E.2d at 1032-33. This Court should deny the State's Petition.

II. THIS COURT SHOULD ALSO DENY THE STATE'S PETITION BECAUSE THE OFFICER DID NOT HAVE PROBABLE CAUSE TO ARREST RESPONDENT BASED ON HIS MERE SUSPICION THE WHITE OBJECT IN RESPONDENT'S MOUTH WAS EITHER HEROIN OR COCAINE.

This Court should also deny the State's Petition because Respondent has a valid secondary reason for suppressing the evidence, i.e. there was no probable cause for his arrest. The Illinois appellate court reversed the trial court's decision denying Respondent's motion to quash arrest and suppress evidence for two reasons. First, while the court only "reluctantly" accepted the trial court's conclusion that the officer was justified in stopping the vehicle, it also ruled the officer exceeded the proper

scope and duration of the traffic stop when he interrogated the Respondent about his identity and recent whereabouts. 764 N.E.2d at 1193. However, the Illinois appellate court also ruled the evidence should be suppressed because the officer did not have probable cause to arrest the defendant for drug possession. *Id.* The officer even admitted that he had his "suspicions" that the object in the defendant's mouth was "either heroin or cocaine, one or the other." *Id.* The Court noted, "Suspicions, no matter how reasonable, do not add up to probable cause." 764 N.E.2d at 1193-94; citing *Alabama v. White*, 496 U.S. 325, 330 (1990).

Thus, this case is much different than *Texas v. Brown*, 460 U.S. 730 (1983), where this Court found an officer had probable cause to conclude a green balloon contained heroin. In *Brown*, while conducting a routine driver's licensing checkpoint, the officer noticed in plain view an opaque green balloon in the defendant's vehicle and he testified that, based on his experience in making drug arrests, narcotics were frequently packaged in balloons. *Brown*, 460 U.S. at 733-34. Moreover, the officer noticed that the interior of the glove compartment contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. *Brown*, 460 U.S. at 734. Here, unlike in *Brown*, Officer Lukensmeyer had no indication Respondent was involved in the illegal use or possession of narcotics and he admitted that when he saw a white object in Respondent's mouth he merely had his "suspicions" that it was "either cocaine or heroin."

Having ruled in Respondent's favor on the scope and duration issue, the Illinois Supreme Court declined to address Respondent's probable cause argument. If this Court were to accept the State's Petition, both parties would need to additionally brief the probable cause issue, and this Court, if it ruled against Respondent on

the scope and duration issue, would also have to address these arguments on a matter the State does not even contend is particularly noteworthy or contentious. This secondary issue further complicates the resolution of this case and is an additional reason to deny the State's Petition.

CONCLUSION

The State's petition for writ of certiorari should be denied.

Respectfully Submitted,

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